UTE WATER CONSERVANCY DISTRICT

IBLA 86-1063 Decided January 12, 1989

Appeal from a decision of the Colorado State Office, Bureau of Land Management, modifying right-of-way grants to permit limited public access. C-0102696 and C-26575.

Affirmed as modified.

1. Rights-of-Way: Act of February 15, 1901--Rights-of-Way: Conditions and Limitations

   BLM may revoke or modify right-of-way grants issued under the Act of Feb. 15, 1901, where there is just cause to do so. Where the record shows that BLM seeks to modify a grant issued under the Act to permit public access to the public lands described in the grant, and that the public interest would be benefited by the proposed action, BLM's decision to modify the grant will be affirmed on appeal.

2. Rights-of-Way: Conditions and Limitations--Rights-of-Way: Federal Land Policy and Management Act of 1976

   BLM may require the holder of a right-of-way grant for a municipal water-supply reservoir issued under the Federal Land Policy and Management Act of 1976 to open all parts of the reservoir for limited public access where the grant was conditioned on BLM's right to review at 5-year intervals whether the limited public access should be permitted on the reservoir provided that so doing was in the public interest and would not unduly burden the use of the land as a water-supply reservoir.

APPEARANCES: Mark A. Hermundstad, Esq., and Clark S. Spalsbury, Jr., Esq., Grand Junction, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Ute Water Conservancy District is the holder of right-of-way grants C-0102696 and C-26575 for lands used in connection with two terminal reservoirs. These reservoirs are known as the Jerry Creek Nos. 1 and 2, respectively. By decision dated March 25, 1986, the Colorado State Office,

Bureau of Land Management (BLM), sought to amend these rights-of-way to permit limited public access to and recreational use of the areas surrounding the reservoirs as proposed in the Jerry Creek Reservoirs Recreational Activity Management Plan (RAMP). Appellant filed a timely appeal from that decision.

On February 7, 1963, appellant applied for a water storage reservoir right-of-way for public lands in Mesa County, Colorado, for the purpose of supplying domestic water to the suburban area of Grand Junction, Colorado. The proposed 1,102 acre-foot reservoir was to be located in Jerry Gulch with the water source diverted from the tailrace of an upstream power plant. On June 17, 1963, under the provisions of the Act of February 15, 1901, repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. || 1701-1782 (1982), BLM issued right-of-way C-0102696 to appellant. This reservoir, now known as the Jerry Creek No. 1, was situated in such a manner that approximately two thirds of the submerged lands were owned by appellant with the remaining one-third of the reservoir located on public lands under the management of BLM.

At the time of the grant, there was no provision contained therein authorizing appellant to bar public access. 1/ In 1976, appellant filed an amended right-of-way application seeking authority to exclude the public from the right-of-way area. 2/ Pursuant to this request, BLM issued an amendatory decision dated June 3, 1976, which gave appellant authorization to exclude the public from and prohibit public use of all lands within the right-of-way grant.

1/ We note that, prior to issuance of the right-of-way, the Fish and Wildlife Service (FWS) had indicated that, owing to the small size of the reservoir and the expected high level of turbidity, establishment of a fishery in the reservoir was infeasible. Accordingly, the Regional Director, FWS, concluded that recommendations for the protection of fish and wildlife on reservoir lands were not needed. In 1964, however, this conclusion was apparently reconsidered, and the Regional Director, FWS, recommended that the following condition be included in the grant:

"That the applicant permit public access to the reservation for fishing and to the Colorado Department of Game, Fish and Parks for fish and wildlife management purposes, except for those areas where water works facilities are situated and where such public use can be demonstrated to endanger human life or seriously interfere with efficient operation of the project for a domestic water supply."

Memorandum dated July 22, 1964, from Regional Director, FWS, to State Director, Colorado Land Office, BLM. Since the right-of-way had issued over 2 years earlier, no action was taken on this recommendation.

2/ The record indicates that, prior to this time, appellant had routinely barred access to the reservoir site. The 1976 request was apparently generated by appellant's inability, in the absence of a specific authorization from BLM permitting appellant to close the public lands within the reservoir, to successfully prosecute two individuals who had entered on the land despite appellant's no trespassing notices.

On March 30, 1978, appellant applied for a right-of-way grant for a second reservoir, the Jerry Creek No. 2, pursuant to the provisions of FLPMA. As with the first reservoir, the new 6,321 acre-foot reservoir was to be built in Jerry Gulch with the dam located on appellant's land and the water backing up on public lands. By decision dated May 9, 1979, BLM offered appellant right-of-way grant C-26575 subject to an express stipulation requiring restricted public access to and recreational use of both Jerry Creek No. 1 and No. 2 reservoirs. The stipulation, discussed in detail below, further provided that any public access would be monitored by BLM and other Government agencies to prevent degradation of the reservoirs. Appellant, which strongly opposed any public access to either of the reservoirs, appealed to this Board, which affirmed the propriety of the stipulation requiring public access, provided that such access did not create an "undue burden" upon appellant. Ute Water Conservancy District, 47 IBLA 71, 80 (1980).

Subsequent to this adverse ruling, appellant avers in its statement of reasons (SOR) that it sought a "legislative solution" to the access issue from members of Congress. A bill was introduced in Congress to sell the public land around the reservoirs to appellant, but action on this bill was later dropped (SOR at 2). Meanwhile, BLM, having determined that "budgetary constraints precluded the effective monitoring and controlling of the public use as mandated by the stipulation," offered appellant a modified right-of-way grant on February 26, 1981. In section 1.b. of this grant appellant was given the right to "regulate and restrict public access" to the Jerry Creek No. 2 reservoir, subject to the Government's right to review the grant at 5-year intervals to reconsider the question of limited public access. Section 1.d. of the grant made specific provisions for reviewing the question of public access, including the preparation of a "recreation management plan." Appellant formally accepted this modified grant on March 26, 1981.

Pursuant to the right reserved in the 1981 Jerry Creek No. 2 reservoir grant, BLM commenced preparation of the Jerry Creek Reservoirs RAMP to study the possibility of opening the reservoirs to limited public use and access. The stated objective of the RAMP was "to implement and manage appropriate levels of recreation use at the Jerry Creek Reservoirs while still meeting the overall objective of providing the same quality source of raw water to Ute Water Conservancy District water users, as presently exists" (RAMP at 3). Of the alternatives analyzed in the RAMP, the one chosen was "Limited Public Use." Under this alternative, use would be limited to 20 persons per day. BLM explained that

> [l]imiting the amount of use to 20 people per day was done for three reasons. First, it was felt that the environmental assessment for Jerry Creek No. 2 [3/] intended to limit recreational use not only in type of use but also in amount of use.

3/ The environmental assessment referred to in this quotation was prepared pursuant to appellant's initial application for a right-of-way grant for the Jerry Creek No. 2 reservoir, and is a part of the record on appeal.

> Second, it was determined that the reservoirs should be managed as a "quality warm waters fisheries." * * * Finally, it was felt that by limiting the amount of recreational use would also limit any potential adverse impacts to water quality to an acceptable level.

Id. at 8. The RAMP then proceeded to list several restrictions on the proposed public use designed to further limit the potential impacts on water quality. Id. at 8-9.

Discussing the alternative selected in the RAMP, the decision presently on appeal states that

> [t]he RAMP and associated environmental assessment concluded that impacts on water quality would be negligible and outlined a water quality monitoring plan for the reservoirs. As BLM would bear the costs associated with installing facilities and managing limited recreational use of the reservoirs, the RAMP identified no increase in costs to Ute Water that would be passed along to their customers.

(BLM Decision at 1). Because existing provisions in both rights-of-way expressly precluded any public access to the reservoirs, BLM found it necessary, in order to implement the proposals in the RAMP, to modify the grants to provide for such access. It was to this end that BLM issued its March 25, 1986, decision. Specifically, the decision held:

> The BLM has therefore determined in accordance with the rights reserved in the right-of-way grant for Jerry Creek Reservoir #2 and the terms of the Act of February 15, 1901, that it is in the public interest to open Jerry Creek Reservoirs #1 and #2, including the portion of the reservoirs located on private lands, to limited public access as detailed in the Jerry Creek Reservoirs RAMP.

With respect to the right-of-way grant for the Jerry Creek No. 1 reservoir, the decision provided: "The amendatory decision for right-of-way C-0102696 dated June 3, 1976, is hereby vacated in its entirety. All previous terms, conditions, and stipulations in the original right-of-way C-0102696 for Jerry Creek reservoir #1 shall remain in full force and effect."

The decision then modified the Jerry Creek Reservoir No. 2 right-of- way grant by deleting paragraph 1.b., the provision permitting appellant to prevent public use of the reservoir. The decision also made the following modifications to the No. 2 grant:

> Paragraph 1(c) is hereby modified to read as follows:
>
> > The United States retains all rights in the public lands subject to this right-of-way not expressly granted in

> this document, including, but not limited to, the right to require common use of the right-of-way and to authorize compatible uses of the right-of-way, including the subsurface and air space; and a continuing right of access onto the public lands covered by the right-of-way grant and, upon reasonable notice to the holder, access and entry to any facility constructed on the right-of-way. The United States retains the right to regulate and restrict public access to the reservoir authorized herein in accordance with the Limited Use Alternative of the Jerry Creek Reservoirs Recreation Activity Management Plan to protect the security of the facility and the integrity of the water supply.

Paragraph 1(d) is hereby modified to read as follows:

> The United States retains the right to review this right-of-way grant at the end of the twentieth year
> of its term and revise or modify its terms at that
> time.

All other terms and conditions of right-of-way grant C-26575 remain unchanged and in full force and effect.

(BLM Decision at 2).

The respective parties have vigorously challenged and defended the decision to modify the right-of-way grants and to implement limited public use and access to the reservoir areas. The two fundamental issues on which appellant and BLM disagree are whether BLM has the authority to require modification of the two right-of-way grants to provide for public access both to the public lands and the private lands within the reservoir area and whether, given the purpose of the reservoirs to store water for municipal use, it is in the public interest to allow public recreational access
to the reservoirs. Appellant has registered strong opposition to any pub-lic use of the reservoirs, and contests BLM's authority to restructure the grants to allow public use thereof. While the two issues raised herein are not necessarily discrete, it is obvious that before any implementation of the RAMP, the two right-of-way grants, which both presently permit appel-lant to bar public access, must be modified to allow limited public access. Accordingly, we initially address the question of whether BLM has the authority to implement changes in the grants which would require public access to the lands surrounding the two Jerry Creek reservoirs.

The first issue to be addressed is whether BLM had the authority to modify the right-of-way grant for the Jerry Creek No. 1 reservoir so as to open the reservoir in its entirety, including private lands, to limited public access. We begin by noting that, in its Answer to appellant's SOR, BLM makes the following concession concerning the Jerry Creek No. 1 reservoir lands privately held by appellant:

> [A]fter carefully reviewing the Board's Ute Water Conservancy District decision, supra, and its own decisions of May 9, 1979, and February 26, 1981, [BLM] has concluded that it did not reserve in its 1981 decision the right to require Ute to open that part of the Jerry Creek No. 1 reservoir located on Ute's private land to limited public access as a condition to the grant of the right-of-way for the Jerry Creek No. 2 reservoir. As that right was not reserved, to the extent the appealed from decision can be interpreted as requiring Ute to do so now, the BLM concedes that it has no authority to do so in the present circumstances.

(Answer at 18).

We agree. Nothing in its original right-of-way C-0102696 for the Jerry Creek No. 1 reservoir required appellant to open up its private lands for public use. Nor did BLM condition the grant of right-of-way C-26575 for the Jerry Creek No. 2 reservoir on such a requirement. 4/ Thus, we must concur with counsel for BLM that, at the present time, the Department has no authority to require appellant to open up its private lands surrounding the Jerry Creek No. 1 reservoir to public use. 5/ Accordingly, we hereby modify the BLM decision to so provide.

[1] A different answer, however, obtains with respect to the public lands surrounding the Jerry Creek No. 1 reservoir. As noted above, appellant's right to exclude the public from the public lands surrounding the Jerry Creek No. 1 reservoir derives not from the initial right-of-way grant but from BLM's amendatory decision in 1976. The authority of BLM to subsequently revoke this permission was expressly affirmed in our decision in

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4/ That BLM had the authority to condition the 1981 right-of-way on such a requirement was expressly upheld by the Board in Ute Water Conservancy District, supra. BLM, however, failed to avail itself of this authority when it issued right-of-way C-26575. See discussion, infra.

5/ Appellant points out that the RAMP failed to make any distinction between use of private and public lands surrounding Jerry Creek No. 1 reservoir and fails to consider in its analysis of fencing and other aspects of limiting public use of the reservoirs the effect of no use of Jerry Creek No. 1 reservoir private lands, suggesting that the unavailability of the private lands surrounding the Jerry Creek No. 1 reservoir fatally compromises the RAMP (Reply at 17). BLM responds that the exclusion of the private lands covered by the Jerry Creek No. 1 reservoir "will create minor, but not insurmountable, problems and that is not necessary to make a major revision of the RAMP" (Response at 10). Considering the multiplicity of issues which the RAMP analyzed (see discussion, infra), we agree that a major revision of the RAMP does not appear to be necessary. Obviously, however, modifications will be needed before the plan can be implemented. To the extent, therefore, that alterations are necessary, Ute will have an opportunity to make its concerns known to BLM and remains free to appeal the actual implementation of such a plan should it so desire.

Ute Water Conservancy District, supra. Therein, we made express reference to the language of the last proviso of the Act of February 15, 1901, under which the subject right-of-way was issued, which provided:

> That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

43 U.S.C. | 959 (1970) (repealed by section 706(a) of FLPMA, 90 Stat. 2793). The Board noted that, pursuant to this proviso, it was "within BLM's power to revoke [the 1976 amendatory decision], as it was granted under the terms of this statute, provided that there was just cause to do so." Id. at 80. Moreover, the Board also noted that, even without this statutory language, BLM was authorized to revoke the permission to exclude the public since the grant of a right-of-way to create a body of water does not carry with it exclusive piscatorial privileges and BLM retains the discretionary authority to allow or prevent fishing pursuant to 43 CFR 24.3 (1980). Id. at 81.

In the present appeal, appellant "agrees that the right-of-way for No. 1 was granted under the 1901 Act * * * and that any permission given under that Act is revocable" (Reply at 20). Appellant nevertheless seeks to distinguish our previous ruling from the case presently before us. First, appellant argues that

> [i]n its 1980 decision, IBLA was asked to determine, among other things, whether the BLM could require, under the 1979 [right-of-way] offer, that the public lands around No. 1 be opened to limited public use as a condition to granting Ute a right-of-way for No. 2. The present appeal involves a proposed RAMP, developed by the BLM under the authority of the 1981 grant, which RAMP, by the express terms of the 1981 grant, was to be limited to No. 2. Thus, contrary to the BLM's argument, this issue has not previously been decided by IBLA.

(Reply at 19). Appellant's argument misapprehends the real holding of our prior decision insofar as the public lands within the Jerry Creek No. 1 reservoir are concerned. While it is true that the Board affirmed the authority of BLM to precondition the right-of-way for the Jerry Creek No. 2 reservoir on a condition which would require appellant to open up all lands, private as well as public, within the Jerry Creek No. 1 reservoir, the Board also clearly held that, insofar as the public lands within that reservoir were concerned, BLM possessed the authority, independent from any subsequent right-of-way grant, to revoke its permission for appellant to exclude the public from those lands.

While it is certainly true that the RAMP was triggered by and required under section 1.d. of the Jerry Creek No. 2 reservoir right-of-way, nothing precluded BLM from concurrently considering, under the authority provided in the 1901 Act, the access issue as it related to the public lands within the

Jerry Creek No. 1 reservoir right-of-way within the same RAMP. In fact, the decision presently on appeal, by providing for the revocation of the 1976 amendment to the Jerry Creek No. 1 reservoir right-of-way separate
from the revisions of the Jerry Creek No. 2 reservoir right-of-way has effectively exercised this independent authority.

Appellant also contends that BLM failed to follow its own procedures when revoking the 1976 amendment, and that this alleged failure resulted in an unlawful termination of its rights under the Jerry Creek No. 1 reservoir grant. Appellant argues that the decision under appeal, while couched in terms of modification, actually "terminated both grants" (SOR at 8). This contention borders on the specious.

Appellant asserts that "[t]ermination of some of the most important terms of [right-of-way C-0102696] effectively terminated the entire Grant even though the BLM offered to let Ute Water retain some of the rights it had previously held under the No. 1 Grant." It is difficult to understand how the right to exclude the public from the reservoir can be deemed to be one of the most important terms of the grant when appellant did not obtain that right for more than 13 years after the initial right-of-way was issued and the lands were inundated with water. Indeed, since appellant only obtained such authority upon the issuance of the 1976 amendatory decision expressly granting the same, it is crystal clear that such authority is not a necessary appurtenance to the exercise of rights under the 1901 Act. Nor did anything in the decision appealed from alter the terms of the right- of-way which appellant originally received. It merely revoked authority independently granted. Thus, every term of appellant's right-of-way as originally issued remains unchanged. There is simply no basis in law or logic for an assertion that revocation of the right to exclude the public from the public lands constitutes a termination of the underlying right-of-way, which itself granted none of the rights now rescinded. 6/

Appellant suggests that BLM's decision modifying the right-of-way violated certain procedures established in the BLM Manual, which govern the termination and modification of right-of-way grants issued by BLM. Certain of the provisions cited require the initiation of an amendment or other modification to the grant to be made by the holder of the grant, and state that there must be mutual agreement between the authorized officer and the grantee before making any modifications. Appellant has also cited to the Departmental regulation at 43 CFR 2803.6-1(a), which states, in pertinent part, that "[a]ny substantial deviation in location or use * * * shall require the holder of a grant or permit to file an amended application."

6/ Moreover, if, in fact, BLM's decision constituted a termination of right-of-way C-0102696, appellant's continued occupancy of the land is in the nature of a continuing trespass, since under 43 CFR 2804.1(b) the filing of an appeal from a decision of the authorized officer under Part 2800 does not stay the effect of the decision. The short answer, of course, is that nothing in the decision of the authorized officer purported to terminate the right-of-way and appellant's occupancy of the land thereunder is authorized by law.

From its reading of these provisions, appellant concludes that "[m]odification by amendment is therefore a procedure which generally requires the request of the holder, always requires the consent of both the holder and the BLM (whether by terms of the original agreement or by subsequent agreement), and it must otherwise comply with law and regulations" (SOR at 9, emphasis in original).

Appellant's argument in this regard must be dismissed as being with- out merit. The provisions of the BLM Manual cited by appellant are in
the nature of general directives to BLM for consideration of modification requests initiated by a grantee. Nothing therein defines or even addresses the Secretary's statutory authority under the 1901 Act to properly exercise his discretion to revoke permissive uses granted under the Act.

Appellant also challenges BLM's decision to require appellant to open the lands surrounding the Jerry Creek No. 2 reservoir, including appellant's private lands, to limited public access. We initially note that there appears to be little dispute between the parties that BLM does have the authority under the Jerry Creek No. 2 reservoir grant to require public access to the public lands. Thus, appellant conceded that:

> BLM may open the public lands subject to the No. 2 right-of-way pursuant to the agreement embodied in the No. 2 Grant. Ute Water disagrees with the BLM's decision to do so, but it does not dispute the fact the BLM may exercise the very rights to which Ute Water agreed * * *. [Emphasis in original.]

(SOR at 22).

There is much dispute, however, over whether BLM reserved the right
to require appellant to open the private lands surrounding the Jerry Creek No. 2 reservoir, as well as to whether the decision to open the public lands (as opposed to BLM's authority to do so) is justified on the present record.

The 1981 decision accompanying the issuance of right-of-way C-26575 noted that BLM reserved the right to review "the question of public access to Jerry Creek Reservoir Number Two." Section 1.d. of the right-of-way, itself, provided that the United States retained the right to review the right-of-way each 5 years "to consider whether or not there shall be restricted public access to and recreational use of the Jerry Creek Reservoir Number Two." Nothing in either document, however, either expressly limited the right of review to the public lands or explicitly noted that
the right to review embraced appellant's private lands. Accordingly, to support their respective positions, both parties have turned to evaluating the circumstances surrounding the modification of the 1979 grant after the Board's previous Ute Water decision and to interpreting the language in the 1981 right-of-way and the accompanying decision. To put these arguments in their proper context, it is useful to review the actual language of the reservation in light of BLM's original proposal in 1979.

The right-of-way which BLM offered to appellant in 1979 contained the following stipulation:

> 1. There shall be restricted public access to and recreational use of Jerry Creek Reservoirs Number One and Two in their entirety, including those portions on private land. This public use shall be in accordance with the Jerry Creek Number Two Recreation Management Plan (RMP). The RMP shall be developed by BLM with input from the Ute Water Conservancy District and the public. The plan shall be completed 90 days after issuance of the grant. Any additional cultural resource evaluation resulting from the RMP shall be the responsibility of the BLM.

As noted above, Ute appealed the inclusion of this stipulation in the right-of-way. In its decision denying that appeal, this Board held that BLM had authority to make issuance of the right-of-way contingent on acceptance of the stipulation. Ute Water Conservancy District, supra at 73. Specifically, the Board stated:

> The Department may impose stipulations as a condition precedent to granting a right-of-way where it is in the public interest to do so, provided that such conditions are not inconsistent with or do not unreasonably burden the objective of the proposed right-of-way.
>
> Moreover, it is established that the Department may equally require the right-of-way applicant to take action relating to private lands as a condition of the grant of the right-of-way. Thus, BLM correctly required that all of these reservoirs, even those portions thereof situated on Ute's private holding, be opened to limited public access as a condition of granting the right-of-way, again provided that such use does not unduly burden the use of this property as reservoirs and is compatible with the public interest. [Emphasis in original; citations omitted.]

47 IBLA at 73, 74. But, despite the fact that the Board clearly affirmed the authority of BLM to make the opening of private land a condition precedent to issuance of the right-of-way, for reasons that will be explored below, this stipulation was ultimately jettisoned and replaced with language accepted by appellant in the 1981 right-of-way.

As issued, section 1 of right-of-way C-26575 contained the following provisions:

> b. The holder has the right to regulate and restrict public access to the reservoir authorized herein as is reasonably necessary to protect the security of the facility and the integrity of the water supply. The right is subject to the right retained by the United States to review the right-of-way grant at five-year intervals as more specifically set out in paragraph "d" of this Section.

c. The United States retains all rights in the public lands subject to this right-of-way not expressly granted in this document, including, but not limited to, the right to require common use of the right-of-way and to authorize compatible uses of the right-of-way, including the subsurface and air space; and a continuing right of access onto the public lands covered by the right-of-way grant and, upon reasonable notice to the holder, access and entry to any facility constructed on the right-of-way.

d. The United States retains the right to review this right-of-way grant commencing on the fifth year from the date of the grant and every five years thereafter, to consider whether or not there shall be restricted public access to and recreational use of the Jerry Creek Reservoir Number Two. This public use shall be dependent upon the Bureau of Land Management's receiving adequate funding to monitor and control such public use in accordance with the Jerry Creek Number Two Recreation Management Plan developed by the Bureau of Land Management with input from the holder and the public. Any additional cultural resource evaluation resulting from the Recreation Management Plan shall be the responsibility of the Bureau of Land Management. The United States also retains the right to review this right-of-way grant at the end of the twentieth year of its term and revise or modify its terms at that time.

In the February 26, 1981, decision accompanying right-of-way C-26575 in its modified form, BLM made the following observation:

> In light of budgetary constraints which at present preclude this Bureau from effectively monitoring and controlling the public use mandated by the stipulation in question, the BLM has determined that a modified right-of-way grant should be offered to the applicant. * * *
>
> The proposed grant will confer upon Ute Water Conservancy District the right to restrict public access to Jerry Creek Reservoir Number Two, subject to the government's right to review the right-of-way grant at five year intervals to reconsider the question of limited public access. The retained right to review the grant every five years is expressly limited to the question of public access to Jerry Creek Reservoir Number Two, and any public use of the reservoir shall depend upon the BLM's receiving adequate funding to monitor and control such use.

BLM maintains that the Board, in its previous Ute Water Conservancy District decision, had "already held the BLM could require Ute to open its private lands for public use as a condition precedent to the granting of a right-of-way for the Jerry Creek No. 2 reservoir." For BLM, then, the question becomes "whether the BLM reserved that right in its February 26, 1981 decision granting the right-of-way for the Jerry Creek No. 2 reser-voir, and in the 1981 grant itself." BLM asserts that a "review of the 1981

decision, the 1981 grant, the 1979 decision, and the grant offered in 1979 shows clearly that it did."

BLM turns to the language of the 1981 decision and grant to support its position:

> Neither the 1981 decision nor the 1981 grant limits the right of review to the public lands within the Jerry Creek No. 2 reservoir complex. The right applies to "the Jerry Creek Reservoir Number Two." Both Ute and BLM obviously knew the Jerry Creek Reservoir No. 2 covers both public and private land. Had they intended to limit the right of review to the public lands, both the decision and the right-of-way grant would have expressly so provided.

(Answer at 24-25). BLM also asserts that the intent to reserve the right to require limited public access to "all" of the Jerry Creek No. 2 reser-voir "is obvious when one reviews the language of the 1979 and 1981 BLM decisions":

> The 1981 decision refers to "the stipulation in question." The stipulation in question was the above-quoted stipulation in the 1979 right-of-way grant offered to Ute which required "restricted public access to and recreational use of Jerry Creek Reservoirs No. One and Two in their entirety, including those portions on private land." (Emphasis added.) The 1981 decision and grant specifically reserve the rights conferred upon the BLM in "the stipulation in question" insofar as the Jerry Creek No. 2 reservoir is concerned.

Id.

Appellant, also relying on the terms of both the 1979 and 1981 right-of-way offers, seeks to differentiate between the provisions in the 1979 right-of-way requiring public access that it had rejected and those in the 1981 right-of-way and decision allowing review of the public access issue at five year intervals. Appellant asserts that the previous Board decision can be distinguished from the present case:

> [T]he [Board] held that the BLM could impose conditions affecting both private and public lands as a condition precedent to the grant of the right-of-way "provided that such use does not unduly burden the use of this property as reservoirs and is compatible with the public interest". The decision did not, however, decide what conditions, if any, the BLM could unilaterally impose after the grant had been made. [Emphasis in original.]

(SOR at 21).

Appellant makes a two-pronged attack against BLM's interpretation of the language found in section 1 of the 1981 right-of-way grant. Initially, responding to the statement in the 1981 decision that the language had been

modified because of budgetary difficulties, appellant argues that, in fact, it was only as a result of political compromise reached after the Board's initial decision that BLM modified the language of the grant to its present form. Appellant states:

> After IBLA's decision, Ute enlisted the assistance of Senator Armstrong of Colorado. Senator Armstrong agreed with Ute's position on the public access issue, and he agreed to introduce legislation in the United States Senate to direct the Secretary of Interior to transfer the public lands around the Reservoirs to Ute.

(Reply at 9). In a letter to the BLM Colorado State Director, dated January 29, 1981, Senator Armstrong explained that he was planning on introducing legislation and stated:

> Though a legislative initiative would certainly resolve the issue, that approach is unnecessarily cumbersome. A plainly superior solution would be a departmental reversal on the question of public access. Such an action appears to be within your administrative discretion and, in view of the need to act swiftly in this case, I would urge your adoption of this approach.

(See SOR, Appendix 10). Appellant claims that "[s]hortly thereafter, the BLM relented and offered Ute a modified grant for No. 2 (the '1981 grant')" (Reply at 10). Thus, "[i]t was only after Senator Armstrong proposed a bill to require that the public lands around the Reservoirs be transferred to Ute that the BLM modified its position, and offered Ute the 1981 grant" (Id. at 15). Appellant apparently sees the modification of the language of the grant, especially the deletion of the language in the 1979 grant requiring "restricted public access to and recreational use of Jerry Creek Reservoirs Number One and Two in their entirety, including those portions on private land," as evidence that BLM, after receiving Senator Armstrong's letter, had, in effect, retreated from its previous position requiring access to the private lands. 7/

Having established its belief that BLM modified the 1979 grant in direct response to Senator Armstrong's letter, appellant then contends that the language of the 1981 grant can only be interpreted as reserving the right to access to the public lands surrounding the Jerry Creek No. 2 reservoir. Whereas BLM argues that the use in section 1.d. of the 1981 grant of the phrase "restricted public access to and recreational use of the Jerry Creek Reservoir Number Two" is a reference to both the private and public lands, appellant strenuously asserts that the only way BLM could have obtained possession of any rights in appellant's private lands would have been by a stipulation expressly granting the right.

7/ Paradoxically, while Congressman Brown of Colorado did introduce H.R. 1012 on Jan. 22, 1981, to provide for the conveyance of land to Ute (see 127 Cong. Rec. 721), Senator Armstrong never introduced his proposed bill in the Senate.

Ute takes issue with the BLM position that it "reserved" the right to require appellant to open its Jerry Creek No. 2 reservoir private lands to public access: "[T]he United States never held the right to require public access to Ute Water's private lands; thus such a right could not have been reserved" (Reply at 11). Appellant also maintains that the general rule of law that any ambiguity in the language of a contract is to be construed against the drafting party should be applied in this case: "[I]f there is any ambiguity in the language [of the 1981 Jerry Creek No. 2 reservoir grant], it should be construed against the drafter of the language, the BLM" (Reply at 13; see also SOR at 5). Finally, appellant claims that because the language concerning retention of the right to review the "restricted public access" issue is in the section of the grant entitled "Rights Under This Right-of-Way Grant" (section 1) and not under the "Stipulations" section (section 3), the grant cannot be read to permit use of the private lands:

> [Section 1] does not deal with rights granted by Ute to the United States. Those rights are contained in the "Stipulations" Section of the 1981 grant, Section 3. If Ute had granted or intended to grant rights in its private lands to the BLM, that grant would have been contained in the Stipulations Section (as it was in the 1979 offer). No such grant is contained in the Stipulations Section of the 1981 grant.

(Reply at 15).

We agree generally with appellant that, absent a provision in the right-of-way authorizing BLM to open the private lands within the Jerry Creek No. 2 reservoir grant, BLM would not have the right to do so. Further, we recognize that, unlike the 1979 right-of-way offered to appellant, the 1981 grant does not expressly mention the opening of private lands for limited public access. However, for reasons outlined below, we cannot agree that the referenced language in C-26575 contemplates the opening of only the public lands within the reservoir.

Appellant asserts that this case requires resort to the rule of construction that ambiguous language in a document must be construed against the drafter, i.e., BLM. An objective reading of the provisions in question, however, leaves no ambiguity. Section 1.d. of the grant provides that the United States retains the right to review the right-of-way "to consider whether or not there shall be restricted public access to and recreational use of the Jerry Creek Reservoir Number Two." The reference in the language to the Jerry Creek No. 2 reservoir, with no qualification as to public or private lands, leads to the reasonable conclusion that the condition in the grant contemplated considering limited access to the entire reservoir, thus to both public and private lands.

Indeed, this conclusion is buttressed by the language appearing in section 1.c. of the right-of-way. In that section, the right-of-way provides that the United States retained all rights not expressly granted "in the public lands subject to this right-of-way." Thus, where BLM intended

to limit the scope of retained rights only to the public lands within the right-of-way, it was quite capable of utilizing words which clearly effectuated this limited intent. The absence of similar limiting words in either section 1.b. or section 1.d. belies appellant's assertion that both of these sections were also to be restricted to the public lands within the right-of-way.

Even if we accept appellant's assertion that the differences between the 1979 and the 1981 Jerry Creek No. 2 reservoir grants were the result
of a compromise generated through the auspices of Senator Armstrong, appellant's position is not materially advanced. The fact that a compromise may have occurred does not, in and of itself, determine the nature of the compromise. Thus, the terms of the 1981 grant clearly eschewed, as BLM now recognizes, any right to open the private lands within the Jerry Creek Reservoir No. 1 to public use. This, in itself, represented a compromise on the part of BLM. But this fact does not necessarily impel the conclusion that BLM intended to compromise on the question of requiring public access to all lands involved in the Jerry Creek No. 2 reservoir.

Appellant's own submissions clearly establish that Senator Armstrong opposed the opening of any part of the two reservoirs to public access and use, yet even appellant recognizes that right-of-way C-26575, at a minimum, granted BLM the authority to open the public lands within the Jerry Creek Reservoir No. 2 to such use. The question whether BLM intended to retain the right to require appellant to open the private lands within the Jerry Creek No. 2 reservoir is simply not determinable through any reference to Senator Armstrong's expressed concerns.

BLM, for its part, ascribes the changes that did occur to a lack of funds which necessitated a deferment of the issue of public access. (See e.g. letter dated February 13, 1981, from Colorado State Director, BLM, to Senator Armstrong (Appendix 11 to SOR)). Moreover, appellant also had a strong incentive to compromise on its opposition to public access and use. In the first place, this Board had already affirmed BLM's authority to precondition issuance of right-of-way C-26575 on a requirement that appellant open the private lands within both the Jerry Creek Reservoir Nos. 1 and 2. Then, too, the record reflects that the dam for the Jerry Creek No. 2 reservoir, as built by appellant, was designed to back water onto public lands.

Without the right-of-way, the Jerry Creek Reservoir No. 2 could only be filled to a capacity of 1500 acre-feet, as opposed to a total capacity of 7700 acre-feet with the right-of-way. (See Appendix 10 to SOR). Appellant clearly had a significant stake in receiving the 1981 grant, and it would
be entirely consistent with the facts of record to assume that it chose to accept the right-of-way without contesting the condition permitting subsequent review of public access to all lands within the reservoir. Thus, the fact that a compromise may have occurred would not justify this Board in ignoring the plain import of the language used in the right-of-way, which as we have noted above, embraces all land within the Jerry Creek No. 2 reservoir, in favor of the restrictive interpretation espoused by appellant.

Finally, as noted above, appellant seeks to show that the stipulation section in a grant is the only place it could have acquiesced in the use of its private lands. The applicable regulation, 43 CFR 2801.2(b), states that "[a]ll right-of-way grants * * * issued, renewed, amended or assigned under these regulations shall contain such terms, conditions, and stipulations as may be required by the authorized officer * * *." Here, an express condition of the 1981 grant was that, at five-year intervals, BLM would have the right to review the issue of access to the Jerry Creek No. 2 reservoir.

By accepting the 1981 grant, appellant was on clear notice of this fact. The mere fact that the requirement to permit further review of the issue was placed in the grant as a condition and not as a stipulation is immaterial. In view of the foregoing, we expressly hold that, under the express terms of right-of-way C-26575, BLM retained the authority to review, at intervals of five years, the question whether all lands within the Jerry Creek No. 2 reservoir should be open to limited public access and use.

Conceding, solely for the sake of argument, that BLM did retain such authority, appellant further contends that the authority was improperly exercised in the instant case. Thus, Ute argues that the limited public access proposed in the RAMP is not in the public interest and is unduly burdensome on the grants issued to appellant and, therefore, should not have been allowed.

In Grindstone Butte Project, 18 IBLA 16, 19 (1974), the Board stated that while conditions could be imposed upon a right-of-way grantee for
the purpose of protecting the public interest, these conditions could be neither inconsistent with nor unreasonably burdensome upon the intended use of the right-of-way. In our previous Ute Water Conservancy District decision, after considering guidelines somewhat less stringent and less specific than the use guidelines outlined in the RAMP presently under review, we concluded "that the record supports [BLM's] decision that allowing access is in the public interest and is not unduly burdensome as proposed." 47 IBLA at 75. We must now further determine whether any factors have changed that would alter our previous ruling.

In Ute Water Conservancy District, supra, we pointed out that BLM's motivation for limited public access was, in large part, to open the reservoirs to public fishing and aesthetic viewing, and further found this motivation to be consistent with various public land laws and Departmental regulations which mandate that the public lands be made available for public fishing. 47 IBLA at 74. We also cited 43 CFR 24.3(b) (1980) (now 43 CFR 24.4(h)(3)) which provides that BLM and other Departmental agencies will permit public fishing provided that they do so "in a manner compatible with the primary objectives for which the lands are administered." We found that this statutory and regulatory foundation clearly established the public interest in permitting the limited public use of the lands surrounding the Jerry Creek No. 1 and No. 2 reservoirs at issue in that decision. Nothing in the present record undermines that conclusion.

Appellant, however, has set forth extensive argument and supporting materials to show that regardless of whether opening the reservoirs is deemed to be in the public interest, the BLM decision to allow limited public access as prescribed in the RAMP and implemented in the decision presently under appeal unduly burdens appellant's use of the right-of-way grants as domestic water supply facilities. The burdens appellant foresees can be grouped into two basic categories: impacts on water quality and associated monitoring and maintenance costs, and increased liability costs and risks.

Addressing the impact of limited public access and use on the water quality of the reservoirs in its previous Ute Water Conservancy District decision, the Board found, based on the record as then established, that

> [t]he record clearly shows that use of the reservoir areas contemplated for fishing and hiking only, if properly controlled, will not prevent or unduly burden use of the land as reservoirs because of pollution. We reject as unsupported Ute's assertion that disastrous consequences to a large number of people may result from allowing restricted use, owing to contamination from human feces. It is clear that this problem may be avoided by providing sanitary facilities for those using the area and by closing the area at dark. In any event, the record shows that
> the proposed limited use will not be so great as to result in
> any appreciable fecal pollution by users.

47 IBLA at 79.

Despite the considerable additional information supplied by appellant both during the RAMP preparation and on appeal, we find our original holding in Ute Water Conservancy District, supra, continues to be valid. As both parties acknowledge, the exact impact of the proposed limited recreational use cannot be determined with certainty until after it is allowed and then monitored. The RAMP makes specific provisions for the monitoring of the water quality:

> A water quality monitoring plan is discussed in Appendix B. This monitoring plan would be implemented by Ute Water. If changes in water quality occur and can be documented, a determination will be made at that point in time by the Bureau of Land Management and Ute Water regarding future recreational use of the reservoirs. Actions that could be taken include allowing recreational use to continue, prohibiting recreational use until the problem is corrected, or something in between.

(RAMP at 12).

BLM thus seeks to implement a use of the reservoir areas which has been shown to be within the public interest; based on the provision of the RAMP quoted above, we find that the RAMP makes adequate provision for monitoring any impact of public use on water quality, and further provides that when

the impact has been assessed, changes or discontinuance of the use can be made if it is determined "by the Bureau of Land Management and Ute Water" that the use as proposed and implemented by the RAMP is unduly burdensome
on appellant's use of the water storage facilities. We find that this contingency built into the RAMP adequately provides for proper monitoring and adjustment should water quality be adversely affected or threatened.

Appellant also strenuously asserts that BLM has failed to adequately assess the increased liability costs and risks associated with opening the reservoirs. In the previous Ute Water decision, when this issue was raised we agreed with BLM that the record at that time showed an additional cost of insuring against such liability would be an additional $400 per year. Thus, we found that,

> [i]n view of the benefit inuring to Ute from receiving this right-of-way grant and BLM's willingness to mitigate the effects of opening the reservoirs by shouldering the balance of the financial and administrative burdens involved therein, we cannot see that it unduly burdens Ute to pay this amount for additional insurance.

47 IBLA at 79.

In the decision record accompanying the RAMP presently under review, BLM made the following observations concerning liability:

> Public comments on the draft RAMP revealed no new information concerning liability that would necessitate a change in the decision. This includes the information provided by Ute Water and Ute Water's insurance agent.
>
> There is no definitive answer concerning liability and insurance. The insurance agent did not state that Ute Water's liability insurance would be cancelled (wholly or in part). The insurance agent did say Ute Water's liability insurance premium would increase if limited public access is authorized at the Jerry Creek Reservoirs, but he did not indicate the possible amount of increase. At what point in time Ute Water's liability insurance would be affected cannot be determined because it is not known when limited public access will be authorized or when use will actually occur. Further, other municipal water suppliers rely on Colorado Statute 33-41-101 for protection from liability claims arising from recreational use of their private property. The question of liability cannot be sufficiently answered until there is a judgment through the court system. Therefore, impacts to Ute Water's liability and insurance cannot be ascertained at present; and it is reasonable to assume Colorado Statute 33-41-103 will cover Ute Water's liability if a third party injury claim is filed resulting from limited recreational use of the reservoirs.

The RAMP, in effect, defers ultimate resolution of the impact of liability costs and possible increased risks on appellant by concluding that the liability issue can only be fully considered when the limited public use is actually authorized and implemented, and by further assuming that Colorado State law would reasonably protect appellant from any increased liability risk.

On appeal, Ute seeks to show that the increase in risk and cost can already be shown to be unduly burdensome on their use of the reservoirs. It acknowledges that, as stated in the RAMP decision record, a fixed determination of the increase in costs had not been made; it contends, however, that this is not from a lack of trying, but is because Government entities such as appellant are experiencing an "insurance crisis." Liability insurance underwriters are simply unable or unwilling to make estimates where an increase in liability risk is foreseen. Therefore, appellant submits, "due to the nature of the insurance crisis, and the unwillingness of insurance companies to give advance quotes on premiums, Ute Water was unable to submit evidence as to the actual amount of the increase in premiums that could be expected" (SOR at 35).

In terms of increased liability costs, appellant essentially seeks to show that, simply because there is a great flux in insurance, requiring it to bear any increase in liability cost is an undue burden. Such a conclusion is unwarranted. Both parties admit that the actual cost cannot presently be established with certainty; BLM was thus correct in deferring the question of this cost until actual implementation of the plan. Further, BLM correctly notes on appeal that none of the information "specifically address[es] the availability and cost of insurance in light of the limited public access provisions set forth in the RAMP" (Answer at 37). When and if BLM ultimately decides to implement its limited access program Ute will be able, at that time, to definitively state what the increase in its insurance premiums are. At that time, BLM can determine whether or not the increase in rates is sufficient to constitute an "undue burden."

Ute also references other costs which it contends it will be forced to absorb. These costs are related to Ute's concerns that public access to its reservoirs will necessitate increased testing, the hiring of two additional part-time caretakers, and increased treatment costs. Appellant ascribes a total of $9,249.51 in increased costs related to the necessity that it increase its sampling of the reservoir. (See SOR, Appendix 34, Exh. A.) Ute estimates an additional first year expense of $30,490.08 for costs of employing "part time caretakers to open and close gates, pick up trash
and to maintain the property and equipment around the reservoirs." Id. Finally, appellant asserts that it will be required to spend an additional $17,973.71 for algae treatment and increased chemical costs at the treatment plant. Ute contends that, in addition to this initial $57,712.30 expenditure, at least $50,000 will be required annually thereafter.

BLM takes issue with the vast majority of these asserted costs. Thus, it notes that all costs associated with the employment of caretakers are based on Ute's assertion that BLM patrols will be inadequate, a point of

view which BLM strenuously challenges. Moreover, BLM also questions how Ute is able to quantify an increase in treatment costs in the absence of any indication that such costs will be necessary. We find ourselves in general agreement with BLM on this point.

A review of Ute's cost data and supporting documentation leads inexorably to the conclusion that Ute's cost figures are dependent on essentially a worst-case scenario. In other words, if all of Ute's fears are realized, then Ute may be required to absorb costs in the range which it has postulated. If, on the other hand, BLM's expectations prove correct, it would appear that the maximum annual expenditure which Ute would expect to absorb is $8,512.01 or between $0.042 and $0.057 per month per customer. 8/ We agree with BLM that, considering the limited public access contemplated appellant's fears seem unrealistic. In any event, should the problems which Ute postulates come to pass, BLM is required, under the RAMP, to reevaluate public access and could further limit or totally prohibit recreational use of the reservoirs.

Finally, we wish to address one additional issue raised by appellant. It contends that even if BLM has properly modified the grants and the uses proposed in the RAMP are in the public interest and not unduly burdensome, "BLM should not be permitted to utilize all of the private lands it proposes to use in the RAMP" (Reply at 16). The RAMP proposes that access roads, parking, trails, and fish-cleaning and sanitary facilities be placed on appellant's private land around the Jerry Creek No. 2 reservoir. Appellant asserts that all such access and facilities should be placed on public, not private, lands. BLM responds that complying with appellant's request would greatly enhance the possibility of contaminating the reservoir and that the placement of the facilities "best avoid[s] any possible pollution of the reservoir" (Response at 10).

Appellant's argument in this regard fails to consider the fact that the 1981 grant was conditioned on the right to determine in the future whether there should be "recreational use of the Jerry Creek Reservoir No. 2" (see 1981 grant, section 1.d.). In light of our finding above that the RAMP and decision appealed from properly implement this use of the reservoir, we must agree with BLM that "recreational use" of the Jerry Creek No. 2 reservoir necessarily implies the placement of facilities in a manner that best avoids possible contamination of the reservoirs. Appellant has not shown that placement of the facilities on public lands would further decrease the chance of contamination.

The present record contains an adequate basis on which to resolve this appeal. Accordingly, we deny appellant's requests for a hearing and for oral argument before the Board.

8/ Thus, Ute noted that an annual expenditure of $50,000 would result in an increase of between $3 and $4 per customer per year. Assuming this ratio, an annual expenditure of approximately $8,500 would result in an annualized increase of between 51 and 68 cents per customer. And even the $8,500 figure is based on cost estimates which BLM alleges are inflated.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified. The case is remanded to BLM for further action consistent with this decision.

James L. Burski
Administrative Judge

I concur:

Anita Vogt
Administrative Judge
Alternate Member